

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

FRANK M. TORELLA
Claimant

VS.

HEN HOUSE MARKET/FOUR B CORP.
Self-Insured Respondent

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Docket No. 1,000,624

ORDER

Claimant requested review of Administrative Law Judge Julie A.N. Sample's Award dated February 5, 2003. The Board heard oral argument on July 23, 2003. Gary M. Peterson was appointed as Board Member Pro Tem for the purpose of determining this matter.

APPEARANCES

Dennis L. Horner of Kansas City, Kansas, appeared for the claimant. Matthew S. Weaver of Overland Park, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

It was undisputed claimant suffered accidental injury to his right foot and ankle arising out of and in the course of employment. The treating physician limited claimant's permanent impairment to his lower leg. The claimant argued that because of antalgic gait from his foot injury he suffered permanent impairment to his ankle and low back. Claimant obtained a medical opinion supporting his contention. Because of the disparity between the medical opinions the Administrative Law Judge (ALJ) ordered an independent medical examination be performed. The ALJ then adopted the findings of the independent medical examiner which concluded that the claimant did not sustain any permanent impairment to either his ankle or back.

The sole issue raised on review by the claimant is the nature and extent of disability. The claimant argues the treating physician imposed permanent restrictions because of claimant's back and agreed he suffered low back problems because of his antalgic gait. And claimant's medical expert opined claimant suffered permanent impairment to his back. Claimant further notes the *AMA Guides*¹ provide for a 15 percent rating to the whole body when an ankle-foot orthosis (AFO) is required. Because claimant was prescribed and wears an AFO brace he contends he is entitled, at a minimum, to a 15 percent permanent partial functional impairment to the body as a whole.

Respondent argues the ALJ's award should be affirmed. In the alternative the respondent contends that if permanency is found by the Board, then the treating physician's 10 percent rating to the lower leg should be adopted.

The sole issue for determination by the Board is the nature and extent of disability, if any.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award contains a detailed recitation of the record and it is not necessary to repeat those facts herein. The Board adopts the findings of fact made by the ALJ that are not inconsistent with the findings and conclusions stated in this Order.

Drs. Edward J. Prostic, Joseph F. Galate and Susan K. Bonar all agreed claimant developed back pain because of an antalgic gait caused by the admitted injury to his right ankle. Dr. Galate provided treatment for claimant's back problems which included physical therapy, pain medications as well as a cortisone injection into claimant's sacroiliac joint. When the claimant reached maximum medical improvement Dr. Galate imposed permanent restrictions against frequent bending as well as lifting more than 30 pounds. Although the doctor agreed the back problems were a natural consequence of the ankle injury, nonetheless, the doctor concluded the back condition was not ratable under the *AMA Guides*.

The court ordered independent medical examiner, Dr. Theodore L. Sandow, Jr., concluded claimant met the *AMA Guides*' DRE Thoracolumbar Category I which results in a 0 percent impairment. The Board concludes claimant's back complaints were a natural consequence of an antalgic gait from his ankle injury but the back condition did not

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.)

result in a ratable permanent impairment under the *AMA Guides*. Consequently, the Board affirms the ALJ's finding claimant did not suffer permanent impairment to his back.

During the course of treatment for the ankle injury, Dr. Bonar, a board certified orthopedic surgeon, prescribed both orthotic shoe inserts as well as an AFO brace for claimant's ankle. The doctor noted that claimant would continue to need those devices in the future. The doctor opined claimant had a 10 percent permanent partial functional impairment to the lower leg based upon the *AMA Guides*, Fourth Edition.

The court ordered independent medical examiner, Dr. Sandow, concluded claimant did not suffer any permanent impairment to his foot because of the normal range of motion and absence of swelling. The ALJ adopted the doctor's opinion and noted:

Obviously, there is some evidence within the record that would justify some award for permanency. Even the treating physician assessed some permanency for the crush injury to the right foot. However, it is the Court's policy to follow the opinions of the independent medical examiner unless those opinions are significantly tainted or compromised in some way.

The ALJ adopted Dr. Sandow's opinions as more persuasive. The Board disagrees. The opinion of the physician appointed by the ALJ should be neutral. But this does not always mean the rating is most accurate. In this case, the rating by the treating physician appears to correspond with claimant's complaints and to appropriately evaluate claimant's impairment.

In this case, the Board concludes the opinion of Dr. Bonar, the treating physician, is more persuasive and more in accord with the claimant's complaints. The claimant was treated with a cast and after developing sores was placed in a CAM walker. During the course of treatment, the doctor prescribed not only shoe inserts but also an AFO brace which the claimant continues to wear. Claimant continues to complain of foot pain and difficulty walking for a very long distance. Based upon claimant's history of treatment and continuing complaints the treating physician opined claimant has a 10 percent permanent partial impairment of function to the lower leg. The Board adopts that opinion and modifies the ALJ's Award accordingly.

AWARD

WHEREFORE, it is the finding, of the Board that the Award of Administrative Law Judge Julie A.N. Sample dated February 5, 2003, is modified as follows:

The claimant is entitled to 12.43 weeks temporary total disability at the rate of \$292.31 per week or \$3,633.41 and temporary partial disability compensation for 4 weeks in the sum of \$222.40 followed by 17.68 weeks at the rate of \$292.31 per week or \$5,168.04 for a 10 percent permanent partial disability to the lower leg, making a total

award of \$9,023.85 which is due, owing and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of July 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Matthew S. Weaver, Attorney for Respondent
Julie A.N. Sample, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director